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No. 43

In the Supreme Court of the United States

OCTOBER TERM, 1944

THE UNITED STATES OF AMERICA, APPELLANT

v.

MARGARET M. JOHNSON AND MARY E. LAYTON, DOING BUSINESS AS THE UNITED STATES DENTAL COMPANY, AND VOYLE CLARK JOHNSON

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF DELAWARE

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The order of the District Court quashing the information (R. 10–11) is based upon its opinion (R. 11–15), reported at 53 F. Supp. 596, quashing a prior information against the appellees.

JURISDICTION

The jurisdiction of this Court on direct appeal is conferred by the Act of March 2, 1907, c. 2564, 34 Stat. 1246, commonly known as the Criminal Appeals Act, as amended by the Act of May 9,

1942, c. 295, 56 Stat. 271 (18 U. S. C., Supp. III, 682), and by Section 238 of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936, 938 (28 U. S. C. 345). The order of the District Court quashing the information was filed on February 2, 1944 (R. 10–11). The appeal to this Court was applied for (R. 15–16) and allowed (R. 17) on March 3, 1944. Probable jurisdiction was noted by this Court on April 10, 1944, and the case transferred to the summary docket (R. 19).

QUESTION PRESENTED

Whether a prosecution for a violation of the Federal Denture Act by using the mails may not be brought in the district in which the denture is delivered through the mails but only in the district in which the denture is deposited in the mails.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Federal Denture Act, "An Act to protect the public health by the prevention of certain practices leading to dental disorders; and to prevent the circumvention of certain State or Territorial laws regulating the practice of dentistry," approved December 24, 1942, c. 823, 56 Stat. 1087; 18 U. S. C., Sup. III, 420f, 420g, and 420h; provides:

> SEC. 1. That it shall be unlawful, in the course of the conduct of a business of constructing or supplying dentures from casts or impressions sent through the mails or in

interstate commerce, to use the mails or any instrumentality of interstate commerce for the purpose of sending or bringing into any State or Territory the laws of which prohibit—

(1) the taking of impressions or casts of the human mouth or teeth by a person not licensed under the laws of such State or Territory to practice dentistry;

(2) the construction or supply of dentures by a person other than, or without the authorization or prescription of, a person licensed under the laws of such State or Territory to practice dentistry; or

(3) the construction or supply of dentures from impressions or casts made by a person not licensed under the laws of such State or Territory to practice dentistry—

any denture constructed from any cast or impression made by any person other than, or without the authorization or prescription of, a person licensed under the laws of the States or Territory into which such denture is sent or brought to practice dentistry.

SEC. 2. As used in the Act, the term—

(1) "Denture" means a set of artificial teeth, or any prosthetic dental appliance;

(2) "Territory" means any Territory or possession of the United States, including the District of Columbia and the Canal Zone.

(3) "Interstate commerce" means (1) commerce between any State or Territory and any place outside thereof, and (2) commerce within the District of Columbia or within any other Territory not organized with a legislative body.

SEC. 3. Any violation of any provision of this Act shall be punished by a fine of not more than $1,000, or by imprisonment for not more than one year, or by both such fine and imprisonment.[1]

Article III, Section 2, Clause 3, of the Constitution, provides:

> The Trial of all Crimes * * * shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; * * *.

The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law * * *.

Section 42 of the Judicial Code (28 U. S. C. 103) provides:

> When any offense against the United States is begun in one judicial district and

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[1] Unlike some of the federal criminal statutes (see list in Note to Rule 20 of the *Proposed Federal Rules of Criminal Procedure*, Second Preliminary Draft, pp. 101-104), the Denture Act contains no specific provision regulating the venue for prosecutions thereunder.

completed in another, it shall be deemed to have been committed in either, and may be dealt with, inquired of, tried, determined, and punished in either district, in the same manner as if it had been actually and wholly committed therein.

STATEMENT

On October 4, 1943, there was filed in the District Court of the United States for the District of Delaware a single-count information which charged appellees, in the course of the conduct of a business of supplying dentures from casts or impressions sent through the mails, with having used the mails for the purpose of sending a set of dentures, not constructed in accordance with the requirements of the Federal Denture Act, from Illinois into Delaware, the laws of which latter state prohibit certain practices, recited in the Act, in connection with the construction of dentures. The use of the mails was alleged to have consisted of the depositing by appellees of the set of dentures in the mails at Chicago for delivery to one Alice Harris at Houston, Delaware. Pursuant to an opinion filed January 26, 1944 (R. 11–15), the District Court on February 1, 1944, entered an order which sustained appellees' motions to quash and demurrers and quashed the information. The decision was based upon the ground that the prosecution could lie only in the Northern District of Illinois, but the opinion, in passing, stated that the information failed to

allege that the dentures were, in fact, received or delivered in Delaware (R. 12, 15). On January 26, 1944, the day the opinion was rendered, the United States Attorney filed another information, in three counts (R. 2–5), to which appellees likewise filed a demurrer and motion to quash (R. 6–10). The first count of the second information is a duplicate of the allegations of the prior information (R. 2–3); the second count contains an additional allegation that "the set of dentures * * * so mailed as aforesaid was then transmitted in due course by the Post Office Establishment of the United States to and into the State of Delaware, to wit, to and at Houston, Delaware" (R. 4); the third count alleges, further, delivery of the dentures to Alice Harris at Houston, Delaware (R. 5). The first two counts allege that the mails were used for the purpose of "sending" the set of dentures into Delaware; the third count alleges that the mails were used for the purpose of "bringing" the set of dentures into Delaware. On February 2, 1944, the District Court, relying upon its opinion of January 26, 1944, entered an order sustaining appellees' motion to quash and demurrer to the second information and quashing the same (R. 10–11). The appeal by the United States is from this order.

The District Court ruled that even though the dentures were alleged to have been delivered

through the mails in the district of Delaware,[2] no offense was committed in that district since criminality under the statute was exhausted at the moment the dentures were mailed at Chicago with the forbidden purpose of sending or bringing them into Delaware (R. 10, 11–15). After pointing out that the significant words of the statute are "to use the mails * * * for the purpose of sending or bringing into any State * * *," the court reasoned that this language fitted in with the pattern for most crimes of an act and intent; that both of these "operative facts" occurred in Chicago; and, hence, that there was a completed criminal offense at the moment of mailing in Chicago. The court stated that "use plus purpose of sending or bringing into any State is what the statute prohibits," and that "It is not an essential prerequisite to a valid conviction that the purpose or intent be,

[2] It is open to doubt whether, in the face of attack by demurrer and motion to quash (par. 12, R. 9), the first count sufficiently alleges a delivery in Delaware. (See *Hagner* v. *United States*, 285 U. S. 427.) The second and third counts of the information, however, in specific terms, charge a delivery in Delaware. The decision of the District Court as to all of the counts was predicated solely upon the lack of power of the Government to prosecute in Delaware. In the event of a reversal, the sufficiency of the first count to allege delivery in Delaware can be determined on remand along with other questions raised by the demurrer and motion to quash as to the construction and constitutionality of the Federal Denture Act and the auxiliary Delaware dental statutes (R. 6–9) which were not decided by the District Court (R. 10, 12, 13).

in fact, effectuated" (R. 12–13). The court also held that the Government could not rely on Section 42 of the Judicial Code (*supra*, pp. 4–5) and the cases thereunder, since the crime was complete at Chicago (R. 13). The court found support for its construction in the failure of Congress to act in response to a suggestion by the Postmaster General, in stating his Department's position with reference to the proposed legislation, that "consideration should be given to the advisability of having the measure provide for prosecution of violators in the jurisdiction where the material is caused to be delivered as well as in the jurisdiction from which it is sent" (R. 14). Reliance was also placed upon the existence in other criminal legislation, notably the Securities and Exchange Act, of special provision for the prosecution of offenses in the district in which an article is delivered (R. 14–15).

SPECIFICATION OF ERRORS TO BE URGED

The assignment of errors filed in the District Court (R. 16–17) may be thus compressed:

(1) The District Court erred in holding that a violation of the Federal Denture Act, by the use of the mails, can occur and may be prosecuted only in the district in which the proscribed matter is deposited in the mails, and not in the district into which such matter is delivered as directed by the sender.

(2) In sustaining the demurrer and motion to quash and in quashing the information.

SUMMARY OF ARGUMENT

To prevent the circumvention of state dental laws, enacted in the interest of the public health, the Federal Denture Act makes it an offense for dental laboratories carrying on business through the mails or by instrumentality of interstate commerce to "use the mails or any instrumentality of interstate commerce for the purpose of sending or bringing into any State or Territory" any denture which could not be supplied intrastate under its laws. Appellees, according to the information, transported a nonconforming denture through the mails from Chicago to Delaware. They were prosecuted in Delaware. The District Court for that District held that they could be prosecuted only in the Northern District of Illinois because a completed offense was committed at Chicago at the moment they, for the forbidden purpose, mailed the denture.

We contend that the Government was not so limited and, at its option, was entitled to prosecute appellees in Delaware.

The statute may not be read as though it penalizes merely the "depositing" of the denture in the mails for a proscribed purpose. The "use" of the mails, or of an instrumentality of interstate commerce, to which the court did not allude, clearly does not terminate until the use to which the offender puts the Post Office Establishment, the railroad, the motor carrier, or the expressman,

is ended. Cf. *United States* v. *Freeman*, 239 U. S. 117. In this case the "use" continued until the denture was delivered in Delaware. Support for this construction is found in language appearing in the Act itself and also in the avowed legislative objective that dentures offensive to the health policies of the states of destination be not transported into those states.

The District Court's interpretation results in incongruities which it can hardly be supposed Congress intended. Although the Act, evidently, applies to a nonmail shipment of a denture from a foreign country, the reasoning of the District Court would exclude such a shipment from the operation of the statute. Also, while the statute is integrated with the laws of the state of destination, the District Court limits venue to the state of origin, thereby thrusting the enforcement role upon prosecuting officials there. Additionally, the Government's principal witness lives in the state of destination.

A. The offense, in our opinion, continues to be committed so long as and wherever the "use" of the mails or an instrumentality of interstate commerce continues for the forbidden purpose, a not unfamiliar concept in federal criminal law. Cf. *In re Palliser*, 136 U. S. 257; *Armour Packing Co.* v. *United States*, 209 U. S. 56. In the absence of any venue provision in the Act, the offense having been committed in Delaware as well as in the Northern District of Illinois, the Government,

under ordinary venue principles, or, perhaps, by the application of Section 42 of the Judicial Code, was entitled to prosecute in Delaware.

B. If certain language in the statute, which we do not think may be so treated, has the effect either of localizing the offense in Delaware or of establishing, within the terminology of Section 42, an offense "begun" in Illinois and "completed" in Delaware, the result is not changed. Under any permissible theory appellees were properly prosecuted in Delaware.

ARGUMENT

APPELLEES WERE PROPERLY PROSECUTED IN DELAWARE UNDER ANY ACCEPTABLE CONSTRUCTION OF THE FEDERAL DENTURE ACT

This case is the initial appearance of the Denture Act in the federal courts (R. 12). As its title indicates, the purposes of the legislation are to "protect the public health by the prevention of certain practices leading to dental disorders; and to prevent the circumvention of certain State or Territorial laws regulating the practice of dentistry." The evils which resulted from the construction and supplying by certain "mail order" dental laboratories of dentures from casts or impressions made by the "patient" himself are depicted in letters from the Administrator of the Federal Security Agency to the Chairmen of the House Committee on Interstate and Foreign Commerce and the Senate Committee on Interstate

Commerce appended to the reports of those committees on the proposed legislation (H. Rep. No. 1893, 77th Cong., 2d sess.; S. Rep. No. 1779, 77th Cong., 2d sess.) and also in the opinion of the Court of Appeals for the District of Columbia in *Farley* v. *Heininger,* 105 F. (2d) 79, decided April 17, 1939, certiorari denied, 308 U. S. 587, sustaining a fraud order issued under the postal laws against one of these laboratories.[3] The state laws generally were adequate to protect the public where the transaction was purely intrastate in character. But, the Senate committee pointed out—

> Under the existing law, the public policy of every State which has enacted health statutes described in the bill can be violated without remedy. Even where two or more States are side by side and all have passed such laws, a violator living in one State escapes the penalty of his deeds in the neighboring State. This bill proposes to stop such transactions by making it a Federal offense to do in interstate transactions what is prohibited in intrastate transactions. This bill does not change the rights or regulate the acts of any citizen which are confined to his own State. It does not impose a new Federal policy on any State.
>
> Its aim is to prevent frustration or evasion of State public health laws [S. Rep. No. 1779, p. 1].

[3] Efforts to curb the practice through the fraud provisions of the postal laws had not proved as effective as was thought desirable, apparently because of the necessity of proving fraud in each specific case (S. Rep. No. 1779, p. 2).

To remedy the evil, Congress, by the Denture Act, has made it an offense for anyone engaged in the business to which the legislation relates to "use the mails or any instrumentality of interstate commerce for the purpose of sending or bringing into any State or Territory" any denture which could not be supplied intrastate under its laws.

A. THE OFFENSE IS ONE WHICH CONTINUES SO LONG AS AND WHEREVER THE MAILS ARE "USED" FOR THE FORBIDDEN PURPOSE. HENCE, CRIMINALITY UNDER THE STATUTE DID NOT END AT THE MOMENT OF MAILING BUT CONTINUED UNTIL DELIVERY OF THE DENTURE IN DELAWARE

As is generally the case in determining the locality of federal crime, the resolution of that question in the present litigation turns upon the meaning which should be given the essential statutory verb[4]—in this case "use." There can be no quarrel with the analysis of the District Court that what the statute prohibits is "use" of the mails plus forbidden "purpose." Appellees "used" the mails at the moment they mailed the denture in Chicago, and they "used" them for the forbidden "purpose". Concededly they offended against the statute in the Northern District of Illinois. Where we part company with the District Court is when it holds that criminality under the statute ceased at the moment of mailing, even though "use" of the mails for the forbidden "purpose" continued until the denture was delivered to the addressee.

[4] Cf. Dobie, *Venue in Criminal Cases in the United States District Court*, 12 Va. L. Rev. 287, 289.

The decision of the District Court thus freezes the crime at the beginning of the denture's interstate journey. We submit that the crime is one of movement and continues until the denture reaches the addressee in the state whose laws it was the purpose of the offender to flout.[5] The verb "use" in the phrase "use the mails" is undoubtedly employed in the Act in the sense of "convert to one's service;" "avail oneself of;" "employ;" "make use of."[6] Clearly one does not cease to "make use of" the mails until the use to which they are put is ended. In this case the "use" to which the mails were put did not cease with the mere deposit of the denture in the mails at Chicago. The purpose of the mailing was the transmission of the denture to Alice Harris in Delaware. Until that was accomplished the mails were still being used for the forbidden purpose.

The unjustified rigidity of the court's construction is emphasized when attention is directed to the fact that the statute covers not only "use" of the mails, but also "use" of "any instrumentality of interstate commerce," a factor to which the court below does not allude in its opinion. Certainly it cannot be said that "use" of an instrumentality of interstate commerce ceases at the moment the denture is delivered to the expressman, the railroad,

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[5] Of course, "use" of the mails may cease earlier if, through some adventitious circumstance, the denture is not delivered to the addressee.

[6] Webster's *New International Dictionary.*

or the motor carrier. No reason suggests itself why a narrower construction should be given where instead the mails are "used." The rule of strict construction of penal statutes does not require that language be so "cabined, cribbed, confined."[7]

Moreover, the prohibited denture is described in the Act (*supra*, p. 3) as any denture constructed from any cast or impression made by any person other than, or without the authorization or prescription of, a person licensed under the laws of the State or Territory "into which such denture is sent or brought" to practice dentistry. It is, therefore, evident that Congress, in penalizing the "use" of the mails or an instrumentality of interstate commerce, was visualizing the normal situation whereby such "use" would result in the denture being delivered to the addressee. Presumably, it intended to penalize a "use" as broad as that which it had in mind. And, of course, the cardinal aim of the legislation, as the Senate Committee Report indicates (*supra*, p. 12), was to prevent the introduction into the states of destination of dentures which offend against their public health policies.[8]

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[7] *United States* v. *Hartwell*, 6 Wall. 385, 396; *United States* v. *Wurts*, 303 U. S. 414, 417; see also *Woolford Realty Co.* v. *Rose*, 286 U. S. 319, 327; *Securities & Exchange Commission* v. *Joiner Corp.*, 320 U. S. 344, 354–355, and cases cited.

[8] The statutory command is that the mails or instrumentalities of interstate commerce are not to be used for the purpose

In determining that the offense occurred at Chicago alone the District Court, in effect, reads the statute as though it provides not for the penalization of anyone who "uses the mails" for the forbidden purpose but of anyone who "deposits" the denture in the mails for the forbidden purpose.[9] There is hardly more justification for such a construction of the word "use" as employed in the Denture Act than there was for the interpretation, rejected in *United States* v. *Freeman*, 239 U. S. 117, of the word "ship" as meaning "deliver for shipment." In the *Freeman* case the statute construed (Criminal Code, Sec. 240; 18 U. S. C. 390) made it an offense knowingly to "ship or cause to be shipped from one State * * * into any other State, * * * or from any foreign country into any State" any package of intoxicating liquor not labeled as required by the statute. The shipment in question was made from the Western District of Missouri into the District of Kansas, and it was contended that the offense was "complete" when

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of sending or bringing offending dentures "into" those states. Cf. *United States* v. *Alaska Consol. Canneries*, 2 F. (2d) 614, 616 (W. D. Wash.).

[9] It should be pointed out, however, that when Congress has had in mind punishment for a "deposit in the mails," as distinguished from the continuing use of the mails, it has used apt words to express that intention. Cf. the Mail Fraud Statute (Criminal Code, Sec. 215; 18 U. S. C. 338):

"Whoever * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, *place*, or cause to be *placed*, any letter * * * in any post office * * * or authorized depositary for mail matter * * * shall be fined," etc. [Italics supplied.]

the package was delivered to the carrier for shipment in the Western District of Missouri and, therefore, could not be prosecuted in the Kansas district. In rejecting this contention, this Court said (p. 120):

> As usually understood, to ship a package *from* one State *into* another or *from* a foreign country *into* a State is to accomplish its transportation from the one into the other by a common carrier, and is essentially a continuing act whose performance is begun when the package is delivered to the carrier and is completed when it reaches its destination. We think it is to such an act that the statute refers. To reach a different conclusion the word "ship" must be read as if it were "deliver for shipment." No doubt it sometimes has that meaning, but it plainly is not so used in this instance. * * *[10]

The *Freeman* decision points also to an incongruity resulting from the construction which had been given by the District Court to the statute there involved which would likewise seem to obtain under

[10] Under the statute in the *Freeman* case the offense was probably not consummated until the shipment was delivered in the state of destination; here, as the District Court correctly held (R. 13), an offense was committed "at the moment of mailing because use plus purpose of sending or bringing into any State is what the statute prohibits." This difference, however, in no way impugns the force of the reasoning in the *Freeman* case that under comparable language the offense was not completed in the state in which the liquor was delivered for shipment.

the interpretation given the Denture Act by the court below. "Interstate commerce" is defined in the Denture Act as meaning "commerce between any State or Territory and any place outside thereof" (*supra*, p. 4). Evidently it is as unlawful to send or bring a nonconforming denture by an "instrumentality of interstate commerce" into a state or territory from a foreign country[11] as it is from another state or territory. The statute in the *Freeman* case, in similar manner, dealt "with shipping liquor from a foreign country into a State as well as with shipping it from one State into another State. It puts both upon the same plane and makes them equally criminal" (p. 120). For this reason, this Court said (p. 120):

> Whatever marks the completion of the offense in one likewise marks it in the other. If it be the delivery to the carrier in the case of interstate shipments it equally is this delivery in the case of shipments from a foreign country. And yet all will concede that Congress did not intend to do anything so obviously futile as to denounce as criminal an act wholly done in a foreign country, such as is the delivery to the carrier where the shipment is from a

[11] While the use of the term "interstate commerce" to embrace what is ordinarily called foreign commerce is perhaps unorthodox, an analogous laxity of expression also occurs in the Act's definition of "interstate commerce" as meaning "commerce within the District of Columbia or within any other Territory not organized with a legislative body" (*supra*, p. 4).

> foreign country into a State. So, if its words permit, as we think they do, the statute must be given a construction which will cause it to reach both classes of shipments, and thereby to accomplish the purpose of its enactment.

While the court below does not refer in its opinion to violations of the Denture Act by the use of "instrumentalities of interstate commerce," it is obvious that if the court's reasoning with respect to cessation of the "use" of the mails at the moment of mailing were carried over into the former field, the Denture Act would be deprived of application to nonmail shipments from a foreign country into a state, even though Congress would seem to have made the Act applicable to such shipments. The same dilemma would, of course, be presented if the denture were transmitted by mail from a foreign country. Any other holding with respect to "use" of an "instrumentality of interstate commerce" would be a recognition that "use" of the instrumentality would continue while the denture is in course of transmission in this country and until it reaches the addressee.

The construction below results in further incongruity. In line with its avowed object of rendering federal assistance to prevent circumvention of the dental laws of the states of destination, the Denture Act is, in terms, integrated with those laws (*supra*, p. 3). Naturally, the prosecuting officials who are

most familiar with such laws and their underlying policy are those in the states of destination. Yet the decision below deprives those officials of any active enforcement role and thrusts upon United States Attorneys in the states of origin, which may perhaps have no similar policy, the burden of informing themselves as to the laws of the state of destination [12] and of enforcing a policy in which they may have but an academic interest. In the state of destination resides also the Government's principal witness. It is impossible to believe that a construction of the statute so out of harmony with its vigorous enforcement was intended by Congress.

If, as we submit, criminality under the Denture Act did not cease at the moment of mailing but continued up to the point where the denture was delivered in Delaware, there can be no doubt that the offenders may be prosecuted in Delaware even though they also violated the statute at Chicago and could have been proceeded against in the Northern District of Illinois. It is not a novel concept in federal criminal law that an offense, because of its continuing character, may be committed in several districts, with the result that the Government has a choice of the place of prosecution, unless, of course, forbidden by some specific

[12] Indeed, in this very case appellees' demurrer and motion to quash raise many questions, not passed upon by the court below, as to the validity and construction of the Delaware dental statutes (R. 6–8; see R. 12).

venue provision, a factor not here existing.[13] In *In re Palliser*, 136 U. S. 257, which involved a use of the mails, this Court concluded (p. 267) that "the offence charged being an offer of money, or a tender of a contract for the payment of money, contained in a letter mailed in New York and addressed to a postmaster in Connecticut, to induce him to violate his official duty, it might admit of doubt whether any offence against the laws of the United States was committed until the offer or tender was known to the postmaster and might have influenced his mind. But there can be no doubt at all that, if any offence was committed in New York, the offence continued to be committed when the letter reached the postmaster in Connecticut; * * * and that, in either aspect, the District Court of the United States for the District of Connecticut had jurisdiction of the charge against the petitioner." *Armour Packing Co.* v. *United States*, 209 U. S.

[13] The defendant is adequately protected in such a situation. As is evident from the decision of this Court in *Armour Packing Co.* v. *United States*, 209 U. S. 56 (see p. 23, *infra*), the Government may not, because of the continuing character of the criminal act, make it the basis of a separate charge in each district. The offense is a single, continuing offense, not a series of offenses, although it is continuously committed in each district in which the criminal act occurs. For this reason the Government is required to select the district in which it will proceed. See *Salinger* v. *Loisel*, 265 U. S. 224, 234; *Haas* v. *Henkel*, 216 U. S. 462, 474. And, since the crime is one, jeopardy, conviction, or acquittal in one district will bar another prosecution in either that or any other district.

56, was a prosecution under a provision of the Elkins Act (49 U. S. C. 41 (1)), which makes it an offense "for any person * * * to * * * receive any rebate * * * in respect of the transportation of any property in interstate * * * commerce by any common carrier" subject to the Interstate Commerce Act. The packing company was indicted in the Western District of Missouri for having received a rebate in connection with a shipment from Kansas City, Kansas, to New York City. The shipment had passed through the Western District of Missouri. The packing company contended (pp. 72–73) that the offense "was not committed in the Western District of Missouri, where the prosecution was had, but that the same was complete in Kansas City in the State of Kansas" and that the Act would be unconstitutional if it were construed to allow prosecution in any other federal district than the one in which the crime was already complete.[14] However, this Court held (p. 74) that "the transportation being of the essence of the offense, when it takes place, whether in one district or another, whether at

[14] While the Elkins Act contains (49 U. S. C. 41 (1)) a specific venue provision permitting prosecution in any district "through which the transportation may have been conducted," this provision could not, of course, serve to confer jurisdiction in some other district than the one in which the crime was complete.

the beginning, at the end, or in the middle of the journey, it is equally and at all times committed" and hence could be prosecuted in any of those districts. The Court pointed out (pp. 76–77) that, of course, repeated criminal charges could not be made in each district through which the transportation at an illegal rate was had, since the offense was "a single, continuing offense, not a series of offenses, although it is continuously committed in each district through which the transportation is received at the prohibited rate."[15]

The crime charged was one over which the District Court for the District of Delaware had general jurisdiction as a District Court of the United States.[16] And, since the crime in question

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[15] Other instances of federal crimes which were held to be punishable in any one of several districts because they were continuing in character and were hence committed in each district are: *United States* v. *Sperry*, 27 Fed. Cas. No. 16369, at 1282 (E. D. Mo.), removal of tax unpaid liquors; *Morris* v. *United States*, 229 Fed. 516, 521–522 (C. C. A. 8), larceny (see also *United States* v. *Folson*, 28 Fed. Cas. No. 16530, at 200 (C. C. D C.), *United States* v. *Haukey*, 26 Fed. Cas. No. 15328, at 227 (C. C. D. C.), and *United States* v. *Mason*, 26 Fed. Cas. No. 15738, at 1196 (C. C. D. C.)); *Smith* v. *United States*, 288 Fed. 44, 46 (C. C. A. 5), embezzlement by a railway mail clerk (see also *Perara* v. *United States*, 221 Fed. 213 (C. C. A. 8), and *In re Richter*, 100 Fed. 295, 298 (E. D. Wisc.).

[16] Section 24, paragraph Second, of the Judicial Code (28 U. S. C. 41 (2)), provides that "The district courts shall have original jurisdiction * * * Of all crimes and offenses cognizable under the authority of the United States."

was properly alleged to have been committed within the territorial limits of that district, there can be no basis for any objection that the venue provisions of the Constitution (*supra*, p. 4) were not met by prosecution in the District Court for Delaware.[17] That court is not deprived of venue by any venue provisions in the Denture Act, since there are none,[18] nor is venue taken away by any

[17] It is settled that the Constitution "does not require the prosecution of the defendant in the district wherein he may reside at the time of the commission of the offense, or where he may happen to be at that time, provided he is prosecuted where the offense is committed. The constitutional requirement is as to the locality of the offense and not the personal presence of the offender." *Armour Packing Co.* v. *United States*, 209 U. S. 56, 76; *Salinger* v. *Loisel*, 265 U. S. 224, 235; *Burton* v. *United States*, 202 U. S. 344, 387; *In re Palliser*, 136 U. S. 257, 265. Considerations of hardship "in permitting prosecutions in places distant from the home and remote from the vicinage of the accused" are matters for congressional, not judicial, concern. *Armour Packing Co.* v. *United States*, *supra*, at p. 77; *Hyde* v. *Shine*, 199 U. S. 62, 78; *Haas* v. *Henkel*, 216 U. S. 462, 473. It also has long been established that a person may be "constructively" present, for the purpose of establishing criminal jurisdiction or venue, in a state or district that he has not physically entered, by virtue of having set in motion a force that takes effect in that state or district. (See *In re Palliser*, 136 U. S. 257, 265–266; *Hyde* v. *United States*, 225 U. S. 347, 362; *Collins* v. *United States*, 65 F. (2d) 545, 547 (C. C. A. 5).) Appellees, by delivering the forbidden package to the Post Office Establishment in Illinois for delivery to the addressee in Delaware, constituted it, of course, their agent and made its acts theirs throughout the whole of the transportation proximately resulting, and thus directly caused a single continuous act which at every stage constituted a forbidden use of the mails.

[18] Cf., *e. g.* Secs. 338a (d), 338b (d), and 408d (d) of 18 U. S. C.

general statutory provision. Indeed, Section 42 of the Judicial Code, a general venue statute (*supra*, pp. 4–5), if it has any application, would preserve venue in the Delaware District Court.[19] It is, therefore, evident that Congress, in failing to incorporate any special venue provisions in the Denture Act, left the question of the place of prosecution to be determined by the application of ordinary venue principles, as, of course, it properly could,[20] or, perhaps, by reference to Section 42. Under either, assuming Section 42 to apply,

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[19] The court below regarded Section 42, evidently, as applicable only to an offense begun in one district and consummated in another (R. 13), as distinguished from an offense which, although already committed in one district, continues to be committed in another. The question is, we think, an arguable one. (Cf. *United States* v. *Midstate Co.*, 306 U. S. 161, 164–165, 166–167; *Hyde* v. *United States*, 225 U. S. 347, 360–361; *Benson* v. *Henkel*, 198 U. S. 1, 15; *United States* v. *Lombardo*, 241 U. S. 73, 77; *In re Palliser*, 136 U. S. 257, 267–268; *Smith* v. *United States*, 288 Fed. 44, 46 (C. C. A. 5). Of course, if the statute applies, it expressly authorizes prosecution in Delaware as the offense, although "begun" in the Northern District of Illinois, was not "completed" until delivery of the denture in Delaware. Since Section 42 bars prosecution in intermediate districts, the question of the application of that section would be of real importance, so far as the Denture Act is concerned, only if prosecution were attempted in any district in which "use" of the mails occurred other than the district of origin or the district of destination, a situation not here presented.

[20] Although there are almost 500 sections in Title 18, U. S. C., alone defining federal crimes, those assisting the draftsmen of the *Proposed Federal Rules of Criminal Procedure* were able to find less than forty sections dealing with venue in connection with specific crimes. See Second Preliminary Draft, Note to Rule 20, pp. 101–104.

prosecution in the District of Delaware was proper.

The court below stresses the failure of Congress to act upon the suggestion of the Postmaster General, in his letter of November 5, 1941, to Chairman Lea, of the House Committee on Interstate and Foreign Commerce, "that consideration should be given to the advisability of having the measure provide for prosecution of violators in the jurisdiction where the material is caused to be delivered as well as in the jurisdiction from which it is sent" (R. 14). The court treats this suggestion as an interpretation of the statute by the governmental department charged with its administration. It should be pointed out, however, that the hearings before the Senate and House subcommittees indicate that the legislation was not "sponsored" by the Post Office Department in the usual sense of that term, that the real impetus for the legislation came from the dental profession, although, it is true, an official of the Solicitor's Office of the Post Office Department suggested legislation to cure the evils at which the measure is directed in canvassing the situation with the Representative who introduced the bill, a dentist by profession, and that the views of each of several governmental departments and agencies interested in various phases of the general problem were secured.[21] And, of

[21] See, *e. g.*, pp. 2–3, 11, 15, 76–84, Hearing before a Subcommittee of the House Committee on Interstate and Foreign

course, as the Act is a criminal statute, enforcement of it is the ultimate responsibility of the Department of Justice. In any event, there is room for question as to whether the Postmaster General's observation was as much interpretation as it was merely a suggestion that the bill include a specific venue provision. The bill, of course, failed not only to provide venue in the state of destination but also in the state of origin. The failure of Congress to act on the suggestion, and, indeed, the complete silence on the matter in the Act's legislative history, may more reasonably be attributed, we believe, to the view that Congress regarded a venue provision as unnecessary and left the matter of the place of prosecution to be determined under ordinary venue principles or, perhaps, to the application of Section 42 of the Judicial Code, rather than to the view entertained by the court below that Congress must be deemed to have intended that venue be restricted to the district of origin.

The same considerations make irrelevant the observation of the court below (R. 14–15) as to the existence in some criminal legislation, particu-

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Commerce, February 3 and 4, 1942, 77th Cong., 2d sess., on H. R. 5674, Vol. 1; pp. 3, 13, 25, 88, 90, 91, 117, 138, 142, 145, Hearings before a Subcommittee of the Senate Committee on Interstate Commerce, July 15, 16, 17, and 20, 1942, 77th Cong., 2d sess., on S. 2371, Vol. 2. [The two bills, H. R. 5674 and S. 2371, were identical. The House bill was passed upon being reintroduced as H. R. 6730. (See Senate Subcommittee Hearings, pp. 2–3; Senate Committee Report No. 1779, 77th Cong., 2d sess., p. 1; Cong. Rec., Vol. 88, Pt. 7, p. 9665).]

larly the Securities and Exchange Act, of specific venue provisions authorizing prosecution in the district in which an article is delivered.

It is also significant that in enacting analogous legislation designed to implement state policy Congress has not been consistent in the incorporation of specific venue provisions. Cf. the Webb-Kenyon Act (27 U. S. C. 122, 123) and the Bone Dry Act of March 22, 1933, c. 4, Secs. 6 and 7, 48 Stat. 16, 19, containing no special provisions on venue, with the Convict-Made Goods Act (18 U. S. C. 396b–396e), which has a provision permitting prosecution in the district "into which" the merchandise is transported. Thus, it appears that there is no congressional policy against prosecution in the state of destination rather than the state of origin under such legislation.

B. ON ANY OTHER PERMISSIBLE THEORY PROSECUTION WAS PROPERLY HAD IN DELAWARE

Our argument has proceeded on the basis that there was a continuing criminal offense during the entire course of the transmission of the denture through the mails, from its deposit in the mails at Chicago until its delivery to the addressee in Delaware. We think that this is the position which has to be taken to conform with that which is penalized—"use" of the mails or an instrumentality of interstate commerce for a forbidden purpose. We regard the words "State or Territory into which such denture is sent or brought" in

the portion of the statute describing the proscribed denture as a recognition on the part of Congress that "use" of the mails or an instrumentality of interstate commerce will, in the ordinary course, result in the delivery of the denture to the addressee, and, hence, as valuable in measuring the "use" penalized (see p. 15, *supra*). If, however, these words have any other significance, they can have but one or the other of two effects, neither of which disturbs our conclusion that it is proper to prosecute appellees in Delaware. They would mean either that Congress was creating an offense which was wholly or completely committed in Delaware, i. e., where the denture was delivered, or, probably sounder, an offense which, although it "began" when the denture was deposited in the mail, in Chicago, was not "completed," in the sense that it was not consummated, until the denture was delivered to the addressee, in Delaware. In the first instance venue could be laid in no other district than the District of Delaware. Cf. *Lamar* v. *United States*, 240 U. S. 60, 66; *United States* v. *Lombardo*, 241 U. S. 73, 77–79; *Burton* v *United States*, 196 U. S. 283, 304. In the second it could be laid in the Northern District of Illinois or the District of Delaware, at the option of the Government, under the precise terms of Section 42 of the Judicial Code. Cf. *Benson* v. *Henkel*, 198 U. S. 1, 15–16; *United States* v. *Freeman*, 239 U. S. 117, 121; *Hyde* v. *United States*, 225 U. S. 347, 360–361.

CONCLUSION

For the reasons stated, appellees were validly prosecuted in Delaware. We, therefore, respectfully submit that the judgment below should be reversed and the case remanded for further proceedings.

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